In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

Supreme Court, U. S.
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No. 79-119

MITCHELL G. VEITCH,
Petitioner,

vs.

SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA,
STATE OF CALIFORNIA,
Respondent,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the State of California, First Appellate District, Division Two

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INTRODUCTION

The People of the State of California, respondent herein and real party in interest below, submit the following brief in opposition to the petition of Mitchell C. Veitch, defendant and petitioner below, for a writ of certiorari.

OPINION BELOW

The opinion of the Santa Clara County Superior Court, which denied defendant Veitch's motion asserting former

jeopardy, is unreported; it is Appendix A to the petition. The opinion of the California Court of Appeal, First Appellate District, Division Two, denying Veitch's application for a writ of prohibition is reported at 89 Cal.App.3d 722; 152 Cal.Rptr. 822; that opinion is Appendix F to the petition.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under title 28 United States Code, section 1257(3).

QUESTION PRESENTED

May a state, by statute, allow a trial judge discretion to grant a convicted defendant's motion for a new trial based on his evaluation of the weight of the evidence without by such action conferring upon the defendant immunity from further prosecution?

STATUTES INVOLVED

Because California Penal Code section 1181 is somewhat lengthy, it is set forth in its entirety in the appendix to this brief. The section's pertinent provision reads as follows:

> "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: 6. When the verdict or finding is contrary to law or evidence, . . ."

California Penal Code section 1180 provides:

> "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading."

STATEMENT OF THE CASE

A. State trial court proceedings

On February 23, 1978, after a trial in the Santa Clara County Superior Court, the jury found Defendant Veitch guilty of violating California Penal Code sections 459 (burglary); 261, subdivisions 2 and 3 (forcible rape and rape by threats); 459 (burglary); 220 (assault with intent to commit rape); 288(a) (forcible oral copulation, with aggravating allegations under section 264.1 (acting in concert) and section 12022 (being armed with a deadly weapon).

On April 26, 1978, the trial judge granted defendant's motion for a new trial pursuant to Penal Code section 1181, subdivision 6, on the ground that the verdict was contrary to law and evidence, "further on grounds of insufficiency of the evidence to support the verdict." On July 31, 1978, defendant filed a motion which in essence sought leave to enter a plea of former jeopardy. This motion was based on the then recently decided cases of *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978). On September 7, 1978, the superior court filed an opinion denying the motion. This opinion, as noted *supra*, may be found at Appendix A to the petition.

B. Proceedings in the state appellate court

Veitch then filed an application to the California Court of Appeal, First Appellate District, Division Two, for a writ of mandate and/or prohibition seeking to restrain his retrial. That motion was denied by per curiam order dated October 25, 1978; it is Appendix B to the petition. On November 24, 1978, the California Supreme Court entered an order which directed the Court of Appeal to hear and determine the defendant's petition on the merits. This order is petitioner's Appendix C.

Pursuant to the order of the Supreme Court, the Court of Appeal entered the usual preliminary orders according to California extraordinary writ procedure (petitioner's Appendices D and E) and, after the filing of briefs and oral argument, on February 26, 1979 filed its opinion denying the relief sought. As noted above, the opinion is reported at 89 Cal.App.3d 722; 152 Cal.Rptr. 822 and is Appendix F to the petition. A petition to the Court of Appeal for a rehearing was denied March 28, 1979 (petitioner's Appendix G) and on April 26, 1979, the California Supreme Court denied a petition for hearing (petitioner's Appendix H).

SUMMARY OF ARGUMENT IN OPPOSITION TO THE PETITION

California, by statute, has given criminal defendants a procedural right additional to and essentially different from the motion for acquittal and appellate review of the sufficiency of the evidence involved in *Burks v. United States* and *Greene v. Massey*. Under California law, a trial judge can grant a motion for a new trial for insufficiency

of the evidence in cases where he would be obliged to deny a motion for acquittal and the appellate court would be required to affirm because substantial evidence is present in the record. In vesting a trial judge with discretion to grant a defendant's motion for a new trial based upon his evaluation of the evidence, the People of the State of California did not intend to confer immunity. In such cases, the defendant's rights are well served by giving him the relief he seeks, i.e., a new trial.

ARGUMENT

AN ORDER GRANTING A NEW TRIAL UNDER PENAL CODE SECTION 1181 (6) MOTION FOR A NEW TRIAL DOES NOT BAR THE NEW TRIAL SOUGHT

In *Burks v. United States,* 437 U.S. 1 (1978) this Court held that the double jeopardy clause of the Fifth Amendment bars retrial of a defendant whose conviction is reversed on appeal on account of failure of proof, since such a reversal determines the question of guilt or innocence as a matter of law, *vis:*

> ". . . such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal —no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty [emphasis in original]. . . . The prevailing rule has long been that a district judge [judging the merits of a motion for acquittal] is to submit a case to the jury if the evi-

dence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt [citation]. Obviously, a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision [citation]. . . . *Given the requirements for entry of a judgment of acquittal,* the purposes of the clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple.'" (emphasis added).[1]

The Court also stated that it makes no difference that the defendant has sought a retrial as one of his remedies, since

> ". . . an appellate court is authorized by [28 U.S.C.A.] § 2106 *'go beyond* the relief sought' in order to provide that relief which would be 'just under the circumstances.'" 437 U.S. at 17-18 (emphasis added).

In the instant case, Vietch requests this Court to extend the holding of *Burks* to motions for new trial. His approach is to attempt to equate the function of the trial judge in ruling on a motion for a new trial with the function performed by an appellate court in reviewing the legal sufficiency of the evidence. He asserts that on a motion for new trial, the trial judge may find that the evidence is insufficient to support the verdict, just as may a reviewing court on direct appeal (Pet. 18); he argues that applicability of *Burks* to motions for a new trial thus ought not be denied simply because a trial judge, rather than an

[1]In *Greene v. Massey,* 437 U.S. 19 (1978), the rule of *Burks* was made applicable to appellate reversals of state convictions on the ground of failure of proof.

appellate court, makes the decision on a motion for new trial.

Petitioner's argument fails because on a motion for a new trial, the trial judge does not perform the function of an appellate court in reviewing the legal sufficiency of the evidence. At the same time, a trial judge's ruling on a motion for a new trial is not tantamount to a court trial on the issue of guilt.

We agree with petitioner that it makes no difference to applicability of *Burks* that it is the reviewing court, rather than the trial court, which determines the evidence to be insufficient if that determination concerns the legal sufficiency of the evidence. See 437 U.S. at 16-17. In California, a defendant seeking a trial court ruling on the legal sufficiency of the evidence can make a motion for acquittal under Penal Code section 1118.1. In passing on a motion for acquittal, the trial judge is required to apply the appellate standard for review of the sufficiency of the evidence to support a conviction. If the motion is granted, the court enters a judgment of acquittal which bars a retrial. See, *People v. Wong,* 35 Cal.App.3d 812, 828; 111 Cal.Rptr. 314 (1973); *People v. Witt,* 53 Cal.App.3d 154, 163; 125 Cal. Rptr. 653 (1975).

At this point, it is worth noting that the California standard for appellate review of the sufficiency of the evidence appears similar to the standard announced by the court in *Jackson v. Virginia,* 47 U.S.L.W. 4883 (June 28, 1979).[2]

[2]A very recent California Court of Appeal decision, not yet final, treats them as identical. *People v. Kent,* 96 Cal.App.3d 130, 134; . . . Cal.Rptr. . . . (August 23, 1979).

Under Penal Code section 1181 (6), on the other hand, the trial judge does not determine the legal sufficiency of the evidence to support the conviction. An appellate court cannot reverse a conviction:

> ". . . on the ground of insufficiency of the evidence by which the verdict can be supported [citations]. But a trial court can grant a motion for a new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution [citations]." *People v. Sarazzawski*, 27 Cal.2d 7, 16; 161 P.2d 934, 939 (1945).

Admittedly, the standard under which a trial judge reviews the evidence on a motion for a new trial is not easy to define. In *People v. Robarge*, 41 Cal.2d 628; 262 P.2d 14, our Supreme Court rejected the notion that the trial judge sits as the proverbial "thirteenth juror." 41 Cal.2d at 634; 262 P.2d at 17. It is more accurate to describe his function as supervisorial:

> "It is the duty of the trial court to see that this function [fact finding by the jury] is intelligently and justly performed. . . .
>
> "This does not mean, however, that the court . . . should decide what result it would have reached if the case had been tried without a jury, but instead should *consider the proper weight* to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient *credible* evidence to support the verdict [citations]." *People v. Robarge*, 41 Cal.2d 628, 633; 262 P.2d 14, 17 (1953). Emphasis added.

The keynote is discretion:

> "In passing upon a motion for a new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion."[3] Ibid.

The basic difference between the trial court's discretion on a new trial motion and appellate review of the sufficiency of the evidence is highlighted by our Supreme Court's decision in *People v. Sheran*, 49 Cal.2d 101; 315 P.2d 5 (1957). In that case, the defendant was convicted of second degree murder. He moved for a new trial based on insufficiency of the evidence. The trial court refused to grant a new trial but instead reduced the verdict to manslaughter, a lesser included offense.[4] Both sides appealed, the People from the order reducing the verdict, the defendant from the denial of the requested new trial. The court affirmed both orders and, significant for present purposes, stated:

> "The power given by the statute (Pen. Code, § 1181, subd. 6) to the trial court is to be exercised as that court typically functions [citation]. The section in effect provides that in lieu of granting a new trial, the trial court may reduce the degree or class of the crime if the evidence shows that the defendant is guilty of a lesser degree or of a lesser crime. Inasmuch as the trial court is given both the power to grant a new trial or reduce the degree or class of the crime in the same section, it would appear that the trial court's exercise of the power is the same in both cases.

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[3] An appellate court, of course, does not "make its own subjective determination of guilt or innocence." *Jackson v. Virginia, supra*, 47 U.S.L.W. at 4886, fn. 13.

[4] Section 1181, subdivision 6, authorizes the trial judge to reduce the verdict to a lesser offense as an alternative to granting a new trial.

> The second question which presents itself is whether there is evidence in the record, or inferences to be drawn from that evidence, to support the trial court's determination that the defendant was guilty of no greater crime than manslaughter. Unless we can say as a matter of law that there is no evidence in the record, and that no inference can be drawn from the evidence contrary to those drawn by the jury, we must affirm its order reducing the class of the crime." 49 Cal.2d at 109-110; 315 P.2d at 10.

Thus, in the *Sheran* case, the trial court's exercise of discretion in ruling on the new trial motion was accorded the deference which appellate courts normally reserve to jury verdicts or trial court findings of fact.

Moreover, any claimed "embarrassment, expense, ordeal and . . . continuing state of anxiety" (Pet. p. 28) of petitioner is the direct result of the granting of the very relief which petitioner himself expressly requested. Retrial is what the defendant seeks. If he wishes outright reversal for failure of proof, appeal is available. Having sought retrial, he cannot now be heard to complain that his request has been granted.

"A motion for a new trial is a legislatively established procedure which it is the right of any convicted defendant to invoke." *People v. Sarazzawski, supra,* 27 Cal.2d at 17; 161 P.2d at 939. Surely, neither the double jeopardy clause nor the *Burks* decision were intended to frustrate California's legislative intention to afford a convicted defendant a remedy which is less drastic than an outright acquittal and which is in addition to a motion for acquittal under Penal Code section 1118.1. To allow Veitch to plead the

granting of his new trial motion as a bar to the conviction which may result from the new trial would violate the express legislative definition of a grant of a Penal Code section 1181 (6) motion, *vis:*

> "The granting of a new trial places the parties in the same positions as if no trial had been had. . . . *The former verdict or finding cannot . . . be pleaded in bar of any conviction which might have been had under the accusatory pleading.*" (Pen. Code § 1180, emphasis added.)

The fact that the grant of a Penal Code section 1181 (6) motion for a new trial is appealable by the state (see Pen. Code § 1238 (a) (3)) provides further proof that such a grant does not operate as an acquittal. By contrast, a grant of a Penal Code section 1118.1 motion for acquittal by the trial court is not appealable, and bars further prosecution for the same offense. Penal Code section 1118.2. To conclude that the grant of a motion for a new trial provides the same result as does a Penal Code section 1118.1 acquittal would render Penal Code section 1181 (6) nugatory, thus depriving California judges of a valuable tool for insuring that justice is done in our courts. A defendant who, as a means of avoiding judgment and imprisonment on the verdict of guilty, requests a new trial, scarcely presents the picture of an all powerful state relentlessly pursuing a defendant who had been found not guilty. As Judge Wright stated in his order denying leave to plead former jeopardy, "It would certainly come as a surprise to a California trial judge that an order granting a new trial was an order preventing a new trial . . ." (Pet. Appendix A at 9).

From a somewhat different posture, defendant urges that the People ought not be permitted to proceed with the new trial because the People did not appeal the order granting the new trial motion pursuant to Penal Code section 1238 (a) (3). (Pet. pp. 21-22.) He asserts that such an appeal, upholding the grant of the new trial, would have produced an appellate decision on the issue of sufficiency of the evidence to which *Burks* would apply "without a doubt" (Pet. 15). Petitioner's argument ignores the role of the appellate court in reviewing the trial court's decision to grant a new trial. The reviewing court determines whether the grant of the motion constituted an abuse of the trial court's broad discretion; the issue is *not* whether the evidence is legally sufficient to support the conviction. *People v. Robarge, supra,* 41 Cal.2d 628, 633; 262 P.2d 14, 17; *People v. Sheran, supra,* 49 Cal.2d 101, 107-109; 315 P.2d 5, 9-10 (1957).

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Dated: October 5, 1979

Respectfully submitted,

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(Appendix Follows)

APPENDIX

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California Penal Code section 1181

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

1. When the trial has been had in his absence except in cases where the trial may lawfully proceed in his absence;

2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property;

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury;

6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed;

7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed;

8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

9. When the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge, thereof, or the reviewing court shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.